Des Moines Cold Storage, Inc. *and* General Team and Truck Drivers, Helpers and Warehousemen, Local 90. Case 18–CA–019653

June 15, 2012

DECISION AND ORDER

BY MEMBERS HAYES, GRIFFIN, AND BLOCK

On August 17, 2011, Administrative Law Judge Earl E. Shamwell Jr. issued the attached decision. The Respondent filed exceptions with supporting argument.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and argument and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions, as discussed and modified below, and to adopt the recommended Order as modified and set forth in full below.

For the reasons set forth in the judge's decision, we agree that credited testimony shows that a successor collective-bargaining agreement between the Union and the Respondent was already in effect on July 20, 2010,[3] and that this agreement, like its predecessor, provided for the Respondent to pay 100 percent of bargaining unit employees' health insurance premiums. In fact, the Respondent made such payments until August 1. On July 20 and 23, however, the Respondent directly informed unit employees that they would be required to pay a portion of their health insurance premium. The Respondent also informed the employees of a new set of options for coverage, and told them they would not have coverage if they did not choose one of the offered plans. Thereafter, the Respondent unilaterally imposed the announced changes.

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally modifying the terms of the collective-bargaining agreement, *and* by unilaterally making changes in the unit employees' health insurance benefits without first notifying the Union and giving it an opportunity to bargain.[4] The judge thereby invoked two separate theories of violation. As the Board has explained,

> The "unilateral change" case and the "contract modification" case are fundamentally different in terms of principle, possible defenses, and remedy. In terms of principle, the "unilateral change" case does not require the General Counsel to show the existence of a contract provision; he need only show that there is an employment practice concerning a mandatory bargaining subject, and that the employer has made a significant change thereto *without bargaining*. The allegation is *a failure to bargain*. In the "contract modification" case, the General Counsel must show a contractual provision, and that the employer has modified the provision. The allegation is a failure to adhere to the contract. In terms of defenses, a defense to a unilateral change can be that the union has waived its right to bargain. A defense to the contract modification can be that the union has consented to the change. In terms of remedy, a remedy for a unilateral change is to bargain; the remedy for a contract modification is to honor the contract.[5]

Inasmuch as we agree with the judge that a contract providing for employer payment of 100 percent of health care premiums was in effect when the Respondent required employees to assume a share of premium payments or lose health care coverage, we conclude that the Respondent unlawfully modified the contract without the Union's consent, and we shall provide the appropriate remedy for this violation. We find it unnecessary to pass on whether, absent an extant contractual provision, the Respondent made an unlawful unilateral change without affording the Union advance notice and opportunity to bargain.[6]

---

[1] We affirm the judge's decision, following the Acting General Counsel's objection, not to admit into evidence the affidavit of the Respondent's president, Charles Muelhaupt. We note that the Respondent offered no medical evidence to support its claim that Muelhaupt was unable to appear at the hearing. See *Valley West Welding Co.,* 265 NLRB 1597 fn. 3 (1982). Moreover, even if the affidavit were admitted, it would not affect the outcome of the case.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] All dates are in 2010.

[4] The judge also found that the Respondent violated Sec. 8(a)(5) by bypassing the Union and dealing directly with unit employees concerning changes to their health insurance coverage. The Respondent's exceptions to this finding are limited to contesting the judge's credibility-based findings that the Union did not give the Respondent permission to speak directly to employees about this matter. As previously stated, we find no basis for reversing the judge's credibility findings.

[5] *Bath Iron Works Corp*., 345 NLRB 499, 501 (2005), affd. sub nom. *Bath Marine Draftsmen's Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007).

[6] Accordingly, the judge's conclusions of law are amended by deleting par. 4(c). Without reaching the issue, we note that even if, as the Respondent contends, no contract was in effect as of July 20 when the Respondent announced and claimed to have put in motion its changes in unit employees' health care benefits, we would find that the Respondent violated Sec. 8(a)(5) and (1) of the Act by failing to give the Un-

On about August 10, the Union filed a grievance over the Respondent's modification of unit employees' health care coverage. On August 24, the Union requested information about the newly instituted health care plans in order to facilitate processing of the grievance. The Respondent did not reply to this request. The judge found that the Respondent thereby violated Section 8(a)(5) and (1).

The Respondent excepts to the judge's rejection of its argument that it was not required to provide the information because the grievance was untimely filed. The judge essentially reasoned that the Respondent did not make a contemporaneous reply raising this point in response to either the grievance or the subsequent information request, and it therefore could not raise a timeliness defense nunc pro tunc in this litigation. Accordingly, he concluded that the Respondent was obligated to supply the "clearly relevant" information requested by the Union.

We agree with the judge, for the reason stated in his decision, that the Respondent refused to provide relevant information requested with respect to the processing of a grievance about bargaining unit employees' health care coverage.[7] Moreover, it is well established that an employer is required to provide such information regardless of the potential merits of a grievance. E.g., *Schrock Cabinet Co.,* 339 NLRB 182, 182 fn. 6 (2003). This principle applies even if the employer has a colorable procedural defense to the grievance. See, e.g., *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 438 (1967). Consequently, even if the Respondent could maintain a valid timeliness defense against the grievance, it unlawfully refused to provide the requested relevant information.

AMENDED REMEDY

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act by its midterm modification of unit employees' health care coverage, we shall require the Respondent to restore and maintain the health insurance benefits provided for unit employees under the collective-bargaining agreement effective from April 1, 2010, until March 31, 2013. In addition, the Respondent shall reimburse unit employees for any expenses resulting from the modification of the collective-bargaining agreement, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest computed as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010), enf. denied on other grounds sub nom. *Jackson Hospital Corp. v. NLRB,* 647 F.3d 1137 (D.C. Cir. 2011).

ORDER

The National Labor Relations Board orders that the Respondent, Des Moines Cold Storage, Inc., Des Moines, Iowa, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Bypassing the Union and dealing directly with unit employees concerning their health insurance benefits or any other matter regarding their wages, hours, and other terms and conditions of employment.

(b) Modifying the terms of the collective-bargaining agreement without the Union's consent.

(c) Failing and refusing to furnish the Union with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Restore to bargaining unit employees the contractual health insurance benefits and coverage they enjoyed before the Respondent unlawfully modified the benefits and coverage in August 2010, and make all bargaining unit employees whole for all losses they may have suffered as a result of the Respondent's unlawful actions in the manner set forth in the amended remedy section of this decision.

(b) Furnish to the Union in a timely manner the information requested by the Union in its letter dated August 24, 2010.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount due under the terms of this Order.

---

ion adequate notice and an opportunity to bargain before unilaterally changing employees' health insurance premiums.

[7] Information about unit employees' health care benefits is presumptively relevant (even in the absence of a grievance), and the Respondent has not rebutted the presumption here. We therefore do not rely on the judge's prefatory discussion of principles and precedent relevant to a union bargaining representative's request for nonunit information.

(d) Within 14 days after service by the Region, post at its facilities in Des Moines, Iowa, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with employees by such means.[9] Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 20, 2010.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 15, 2012

Brian E. Hayes, Member

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[8] If this Order is enforced by a judgment of a United States court of appeals, the words on the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[9] For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB No. 9 (2010), Member Hayes would not require electronic distribution of the notice.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT bypass the Union as our employees' exclusive collective-bargaining representative by dealing directly with unit employees concerning their health insurance benefits or any other matter regarding their wages, hours, and other terms and conditions of employment.

WE WILL NOT modify the terms of our collective-bargaining agreement with the Union without the Union's consent.

WE WILL NOT refuse to provide to the Union requested information which is necessary and relevant to the Union's performance of its functions as our bargaining unit employees' exclusive collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL reinstate the same health insurance plan and benefits that were in effect for our bargaining unit employees before we implemented unilateral changes in those benefits about August 2010.

WE WILL make whole, with interest, all our bargaining unit employees for any losses they may have suffered as a result of our unlawful unilateral modification of the health insurance provision of the collective-bargaining agreement which is effective from April 1, 2010, through March 31, 2013.

WE WILL furnish to the Union in a timely manner the information requested by the Union in its letter dated August 24, 2010.

DES MOINES COLD STORAGE, INC.

Abby E. Schneider, Esq. and *Pamela W. Scott, Esq.,* for the General Counsel.
Michael J. Carroll, Esq. (Babich Goldman, P.C), of Des Moines, Iowa, for the Respondent.

DECISION

STATEMENT OF THE CASE

EARL E. SHAMWELL JR., Administrative Law Judge. This case was heard by me in Des Moines, Iowa, on May 18, 2011, upon an original charge filed by General Team and Truck Drivers, Helpers and Warehousemen, Local 90 (the Union) on January 13, 2011, against Des Moines Cold Storage, Inc. (the Respondent). The Union filed amended charges against the Respondent on January 18 and February 3, 2011.

On March 29, 20011, the Regional Director for Region 18 of the National Labor Relations Board (the Board) issued a complaint against the Respondent alleging that the Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). On or about April 13 and 20, 2011, the Respondent timely filed its answers essentially denying the commission of any unfair labor practices and asserting certain defenses.

Based on my review and consideration of the entire record herein and my observation of the witnesses and their demeanor, along with the arguments and briefs submitted by the General Counsel and the Respondent,[1] I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is an Iowa corporation with an office and warehouse facilities in Des Moines, Iowa, and has engaged in the operation of warehouses providing cold storage services. During the calendar year ending December 31, 2010, the Respondent, in conducting its business operations, derived gross revenues in excess of $500,000. During the calendar year ending December 31, 2010, the Respondent in conducting its business operations, purchased and received at its Des Moines, Iowa facilities goods valued in excess of $50,000 directly from points outside the State of Iowa.

Based on the credible evidence of record, I would find and conclude that at all material times, the Respondent is and has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.[2]

[1] The Charging Party did not file a brief.

[2] See Jt. Exh. 2, a copy of the Respondent's Questionnaire on Commerce Information dated February 9, 2011, and signed by Edward C. Muelhaupt, vice president of the Company. Muelhaupt testified at the hearing and stated that he, along with his father and uncle, comprise the Respondent's management team and that during the past 2 years, including the times material to this litigation, he was responsible for general oversight of the business and its operations. I would find and conclude that based on his testimony and the contents of the questionnaire E.C. Muelhaupt submitted to the Board during the investigatory phase of this matter that the Respondent is an employer within the meaning of the Act.

II. LABOR ORGANIZATION

The Respondent admits, and I would find and conclude that General Team and Truck Drivers, Helpers and Warehousemen, Local 90 is a labor organization within the meaning of Section 2(5) of the Act.

III. THE APPROPRIATE UNIT OF EMPLOYEES

The Respondent admits that the following employees (the unit) constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

> All full-time and regular part-time dock workers, including fork lift operators, employed at its Des Moines, Iowa facility, excluding all other employees, guards and supervisors as defined in the Act.

IV. BACKGROUND AND UNDISPUTED FACTS[3]

The Respondent operates two refrigerated warehouses at its principal place of business in Des Moines, Iowa; the two warehouse facilities are designated the "South Plant" and the "East Plant," both of which are used to store refrigerated foodstuffs—primarily meats.

The Respondent's management team is comprised of Charles (Chuck) Muelhaupt, his son, Edward Charles Muelhaupt (E.C.), and Charles' brother, Joe Muelhaupt. Since about some time in 2009, E.C. has served as vice president of the Company, in which capacity he has general oversight of business development and operations. Plant managers at the South and East Plant report to E.C.[4]

The Respondent employs about 15 workers who have no official job titles but are simply designated dockworkers who are assigned to either the South or East plant facilities. These dockworkers comprise the current bargaining unit represented by the Union which has represented the Respondent's employees for many decades.

During the spring of 2010, the Respondent and the Union commenced negotiations for a new collective-bargaining agreement to replace the then-existing contract set to expire on March 31, 2010. Negotiations for the new agreement were not finalized before the contract's expiration date, so the parties verbally agreed to an extension; some time in May 2010, the new collective-bargaining agreement was ratified by the bargaining unit members. However, the agreement was not formally signed by the Union and the Respondent until July 23, 2010. The term for the new contract was April 1, 2010, through March 31, 2013.

However, on July 20, 2010, the Respondent through E.C. scheduled a meeting with the bargaining unit employees at the East plant and met with them at 4:30 p.m. on that day. At this meeting, E.C. and a representative of the insurance company

[3] In this section, I have determined that matters covered are either undisputed by the parties or are simply supported by the documentary and testimonial evidence submitted by the parties. Where the evidence of record differs from these factual determinations, I have credited the testimony that supports the determinations made here.

[4] Based on his testimony and other credible evidence of record, I would find and conclude that E.C. is a supervisor and/or agent of the Respondent within the meaning of Sec. 2(11) and (13) of the Act.

informed the employees of the Company's proposal for changes in the employees' health insurance benefits plan; mainly, that the employees had to pay for a portion of the premiums associated with their health insurance coverage, and provided the employees with certain information regarding their options for coverage as well as the date on or before which the employees had to decide to enroll or not in the insurance plan. E.C. informed the employees at the July 20 meeting that if they did not choose one of the proffered plans, they would not have insurance coverage through Des Moines Cold Storage. On July 23, 2010, the Respondent convened another meeting with the South plant employees and presented to them the same proposals and options. All bargaining unit members were given the week of July 26, 2010, to provide enrollment information if they desired to have health insurance coverage through the Company.

The Union protested the actions of the Respondent, first by meeting with Chuck Muelhaupt and later with E.C. and then by letter to Chuck requesting that the Company cease and desist from directly bargaining with unit employees and implementing the changes to the health insurance provisions of the collective-bargaining agreement.[5]

On or about August 11, 2010, the Union through its steward filed a grievance in protest of the Company's implementation of the insurance plan proposals.[6] This grievance alleging a violation of the new contract had not has not been resolved as of the date of the hearing.

On about August 24, 2010, the Union sent a letter to the Respondent requesting certain information about the health insurance plans now in place so that the grievance could be processed. The Respondent never responded to this letter request.

On September 9, 2010, the Union sent another letter to the Respondent requesting among other things that the Company schedule a meeting to select an employer and a union representative for a contract-mandated joint settlement board, and informing the Company of the Union's intent to advance the grievance to arbitration. The Respondent did not respond to this letter.

V. THE UNFAIR LABOR PRACTICE ALLEGATIONS

This case essentially derives from the Respondent's proposed implementation of the new health insurance plan on July 20 and 23, 2010, and the actual implementation thereof effective August 1, 2010.

Accordingly, the complaint essentially alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by not providing prior notice to the Union and affording the Union an opportunity to bargain over the proposed health insurance changes; failing and refusing to recognize and bargain in good faith with the Union over the proposed changes; bypassing it and dealing directly with unit employees on July 20 and 23, 2010, concerning the proposed changes; not providing notice to the Union or allowing it to be present at the meetings of unit employees on July 20 and 23; unilaterally offering unit employees a new health insurance plan option; unilaterally requiring the employees to pay a portion of the insurance premiums; and unilaterally modifying the parties' collective-bargaining agreement.

The complaint also alleges that the Respondent violated Section 8(a)(5) and (1) on or about August 24, 2010, by failing and refusing to furnish the Union with certain requested information deemed necessary for and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the unit employees.

VI. THE GENERAL COUNSEL'S WITNESSES

Pat Navin testified that he is employed by the Union as its business agent and has served in that capacity for the past 5 years including all times material to the instant controversy; according to Navin, for the last 3 years he was assigned to represent the Respondent's 15-member unit of dockworker employees. Noting that the Respondent's dockworkers are generally employed to unload trucks and store foodstuffs at the refrigerated warehouses, Navin stated that, to his knowledge, the Union has represented them as far back as the 1930s.

Navin related that the most recent contract negotiations took place in the spring of 2010—March—and that he, along with employee Scott Winters who served as steward, conducted the negotiations on behalf of the dockworkers; the management team was comprised of the Muelhaupts—Charles, who is referred to by the nickname "Chuck," and his son, E.C.[7] According to Navin, the Muelhaupts, Winters, and he met once in April and once in May. Navin described the negotiations as low pressure with few contested issues. Navin stated that he raised the issue of health insurance during the negotiations.

Navin said that at the time the Teamsters were offering an insurance plan through its Central States Fund and he believed that this plan was more economical than the plan currently in place at Des Moines Cold Storage. However, according to Navin, when he broached the matter to the Muelhaupts, they said they were not interested in making any changes to the insurance plans and offered no proposals regarding health insurance.

Navin noted that he was familiar with the Company's history regarding employee health insurance prior to the 2010 negotiations and that the Respondent had always provided unit employees with health insurance benefits for which the Company paid 100 percent of the premium costs; employees did not contribute towards these costs, but only paid plan copays and deductibles where applicable.

Navin identified the collective-bargaining agreement immediately preceding the latest one, the terms of which covered April 1, 2007, through March 31, 2010, and stated that in article 14 dealing with insurance and specifically in part (B), the Em-

[5] The Union took these steps within days of the July 20 meeting through July 29, 2010.

[6] The Union filed the grievance the day after the first insurance premium payments were deducted from bargaining unit members' pay.

[7] Charles Muelhaupt did not testify at the hearing. I was informed for the first time by the Respondent's counsel at the hearing that the elder Muelhaupt was unable to attend the hearing, or otherwise participate in the hearing because of illness or infirmity. The Respondent's counsel proffered an affidavit from the elder Muelhaupt, but I declined to receive it.

ployer's obligation is clearly stated[8] and, further, pursuant to this provision, the employees never paid any portion of their health insurance premiums.

Navin testified that the negotiations for the new contract did not conclude until May 2010. Navin noted that this required the parties to agree in April to a verbal extension of the old contract. Be that as it may, Navin said the new contract was ratified by his members and the Company in May and there certainly were no outstanding contractual issues. Navin said that he did not know that the current insurance plan was up for renewal at the time and neither of the Muelhaupts mentioned that the plan had to be renewed during the negotiations.

Navin, however, stated that the contract was not formally executed until July 2010. Navin also noted that irrespective of the later execution date, the terms of the new contract, such as the new pay rates, were put into effect as of April 1, 2010;[9] the formal signing of the agreement was merely delayed. Navin explained how this happened.

According to Navin, he maintained copies of the various collective-bargaining agreements with the Respondent in his computer. However, in May 2010, his computer was infected by a virus which caused him to lose 5 years' worth of contract files, including the ratified agreement with the Respondent. Accordingly, Navin said he had to retype the entire contract which cost him time.[10]

Navin stated that he was really not concerned about the matter because of the relationship the Union and the Company enjoyed. According to Navin, the Respondent was simply not a high pressure shop and, moreover, everything was agreed to and the contract's terms were already in force and effect. Navin said that the signing was a mere formality to him and, in fact, took place on July 23, 2010; he and Chuck signed off on the agreement in the elder Muelhaupt's office.[11]

However, Navin said that he had a later conversation with E.C. who told him that there was not a signed agreement, or at least he (E.C.) did not have a copy. Accordingly, Navin said that he went back to the Company on July 26 and he discovered that the last two pages of the agreement were missing from the Respondent's copy. Navin said he could not explain why they were missing. Navin went on to say that he had made three copies of the agreement—one for the Company, one for the International, and one for Local 90. However, on July 26, because the signature pages were missing, he and Chuck resigned the contract but dated it July 26 for accuracy. Navin stated that, nonetheless, the contract was identical to the contract he and Chuck signed on July 23. Navin stated that the employer's obligation to pay 100 percent of the employees' health insurance premiums was unchanged under the new contract irrespective of whether it was formally signed on July 23 or 26, and there was no dispute about this on either date.

Navin stated that before the signing of the agreement on July 23, he received a call from Winters on July 20, who informed him that the Respondent was about to make changes in the health insurance plans and had scheduled a meeting with employees at 4:30 p.m. that day at the East plant. Navin said he immediately placed a call to Chuck who did not return his call; whereupon, Navin decided to go to the plant that very day.

Navin testified that upon arrival he saw E.C. in the employee break room and motioned to him to come out to the hallway where he queried E.C. about the meeting and its purpose. According to Navin, E.C. told him that the meeting was being called to discuss different (health) insurance plans the Company would be offering and the percentage (of premiums) the employees would have to pay.

Navin said that he protested this and told E.C. that first, he could not directly bargain with the unit employees and, second, he could not unilaterally change the provisions of the new contract and that he should immediately cease and desist any meeting with the employees. Navin stated he left the matter at that and decided not to attend the meeting to avoid giving any credibility (as he put it) to the meeting. However, as he was leaving the premises, Navin said he asked Winters to report to him what had transpired at the meeting.

Later that day, Navin said that Winters advised him that at this meeting the Company offered three different health plan options and the employees were instructed to choose one; according to Navin, Winters told him there were "copays" associated with all of the plans. Navin stated that he instructed Winters not to sign on to any of the options until he had a chance to discuss the matter with Chuck.

While not sure of the date, Navin testified that he spoke to Chuck who assured him that the Company was going to continue paying 100 percent of the premiums as it had in the past, but that the Company might have to look at another insurance plan (provider).

Navin said he told Chuck that irrespective of the plan(s) the Company was looking at, the benefits would have to be identical in terms of benefits to the new contract. Navin said that he left this meeting believing that the issue had been laid to rest, that he relied on Chuck's representation that the Company would continue to pay 100 percent of the premiums.

However, Navin later learned that the matter was not resolved. Navin related that Winters and employee Steve Underwood told him that E.C. had informed the unit that they had to sign up for one of the insurance plan options he was offering so that payroll deductions could commence; otherwise, the employees would lose their insurance coverage through the Company.

Navin said this prompted him to speak to Chuck once more. According to Navin, Chuck again said that the Company was

[8] This contract is contained in R. Exh. 2. Art. 14(B) in pertinent part states:

> After an employee has met there [sic] thirty [30] day probation period the Employer agrees to pay health and welfare benefits. After an employee has accumulated three (3) years of service, the Employer agrees to pay Health and Welfare payments for all periods due during the year on such employee without exception.

[9] Navin identified GC Exh. 3 as the agreement between the Union and the Respondent effective April 1, 2010, through March 31, 2013.

[10] Navin also conceded that when he retyped the new agreed-upon contract, he left off a line in art. 14(B), the health insurance provision that dealt with the employer's agreement to pay health and welfare benefits after the employee met his 30-day probation period. However, Navin stated that, nonetheless, the parties had during negotiations agreed that art. 14(B) did not change at all from the previous contract.

[11] See GC Exh. 10, the contract that Navin said that Chuck Muelhaupt and he signed on July 23, 2010.

going to pay 100 percent of the insurance premiums, but that E.C. was now in charge of the new insurance plan because he (Chuck) understood that the old plan was no longer available.

Navin said that he then arranged to meet with E.C. to discuss the matter. According to Navin, E.C. advised him of the plans in question but then added that the employees would have to pay a portion of the premiums. Navin said he told E.C. that he would not agree to any kind of premium copays for the employees. Navin related that he again admonished E.C., telling him he could not either directly bargain with the employees or unilaterally change the negotiated agreement.

Navin said the meeting ended with his saying to E.C. that if the old plan were no longer available, the Union was amenable to discussing a plan with comparable coverage but one without any employee premium contributions as per the contract that had been negotiated in May and was actually in force. Navin said he made it clear that the Union was firm on this point—the Union would not agree to any plan calling for any employee premium contributions.

Navin testified that on July 27, 2010, he wrote to the Company and essentially advised Chuck that the Union opposed the unilateral change to health insurance provisions of the contract; reminded management that the Union was (per the contract, art. 25) the authorized representative of the unit employees; and urged the Company to cease and desist from these impermissible actions.[12] According to Navin, the Respondent never replied to this letter.

Around August 10, 2010, Navin stated that Winters advised that the employees were having deductions from their pay for health insurance premiums. According to Navin, Winters asked him whether a grievance should be the appropriate response and he told him to file one. Navin noted that Winters filed the grievance on August 11, 2010.[13]

Navin said that after the grievance was filed, he again spoke to Chuck who said the Company was going to pay the insurance premiums as it had in the past, but that E.C. was reviewing other and different plans. Navin volunteered that he enjoyed a pretty good relationship with Chuck and, in fact, admired him, but reluctantly said he had to inform him that what was going on with the insurance matter would result in a labor charge if the Company persisted.

Navin went on to say that in view of the Union's filing of the grievance on August 24, 2010, he sent a letter to the Respondent requesting certain information he thought would be helpful in the processing of the grievance and that he would need this information "in the next 7 days."[14] Navin said that he believed that in view of the Respondent's failure to respond to its letter of July 27, the matter was destined for arbitration so he needed the requested information to present the Union's position at that level. Navin testified that he never received any response from the Respondent, let alone any of the requested information.

Along those lines, Navin said that he again wrote to Chuck on September 9, 2010, regarding the grievance and reminded him that the contract (in art. 9) requires that grievances had to be referred to a joint board comprised of a union representative and an employee representative for possible settlement. Navin said that he advised the Company in this letter that since it had not scheduled a joint board, that a settlement evidently would not be had, and that the Union intended to advance the matter to arbitration.[15]

Scott Winters testified that he has been employed by Des Moines Cold Storage as a dockworker for about 16-1/2 years and has been a member of Local 90 for 15-1/2 of those years; for the past 1-1/2 years, he has served as the Union's shop steward. Winters stated there are about 13 employees in the bargaining unit—8 at the East plant and about 5 at the South plant facility.

Winters said that his duties as shop steward include handling grievances, accompanying employees subject to disciplinary action, and assisting with the negotiation of collective-bargaining agreements, a role he played in the last negotiations that took place in early April 2010, along with Navin and Chuck and E.C. Muelhaupt.

According to Winters, the negotiations went fairly smoothly. Winters recalled that the Union sought and got a 40-cent per hour wage increase and funeral leave for the employees' stepparents. According to Winters, nothing was said about health insurance which was somewhat surprising to him, considering that this was a "hot topic in the world" (as he put it). In any case, Winters said that while he wondered about the insurance subject, he left the negotiations feeling pretty good about what had transpired. Winters conceded that he had no hand in drafting the final agreement.

Winters noted that throughout his career with the Company, the employees have never paid any portion of the health insurance premiums, that all of the contracts he had read during his time with the Company included basically the same language which required the Company to pay the health insurance premiums.[16]

---

[12] See GC Exh. 6, a copy of the letter and a copy of a certified return mail receipt dated July 27 and 29, 2010, respectively.

[13] See GC Exh. 7, a copy of Winter's grievance dated August 11, 2010, cosigned by one of the Company's supervisors on August 12, 2010. The grievance refers to art. 14 of the contract—the health insurance provisions—and states that on August 10, the Company forced bargaining unit employees to pay premiums for medical insurance.

[14] See GC Exh. 8, a copy of Navin's letter addressed to "Mr. Muelhaupt." It should be noted that the letter refers to several meetings had with Chuck about the insurance issue which included the Company's past practice of paying 100 percent of the health insurance and Chuck's assurances that the Company would continue to pay 100 percent. The letter also states that the Company was not complying with the contract and fulfilling its financial obligation as agreed.

The letter specifically requests a list of all bargaining unit employees, the insurance plans currently covering them; suggested plans for bargaining unit employees' payroll; and a statement as to where deductions were spent.

See also GC Exh. 11, a copy of this letter and a copy of a certain mail receipt dated August 26, 2010.

[15] See GC Exh. 12, a copy of Navin's letter dated September 9, 2010. See also GC Ex. 13, a copy of the letter and a certified mail receipt dated September 13. 2010.

[16] Winters stated that he did not participate in any negotiations, presumably, before being elected to the steward's position. He, nonetheless, insisted that he knew what deductions came out of his paycheck, and health insurance premiums never were. (Tr. 109.)

However, Winters said that this changed in August 2010 when he and the other unit employees had health insurance premiums deducted from his and their pay. Winters related the events leading to this change.

Winters recalled that sometime in late July 2010, the Respondent distributed to the unit employees some paperwork relating to health insurance. Winters stated that he did not receive his copies of the paperwork until the day of a meeting the Company had scheduled with the employees. Winters said that on the day of the meeting employees approached him and asked if he knew what was going on, and at that time he discovered the Company's plans for a new health insurance plan and policy that included an employee premium contribution. Winters said the employees were very upset over this, but for his part he was not altogether sure what the meeting was about until it started.

Directing himself to the meeting, Winters said that E.C. led the presentation but the proposed changes were also explained by a representative from the insurance provider—Natalia. After the presentation, Winters said that he spoke up, saying that to him it appeared the Company was going to start making the employees pay premiums, and E.C. said that was correct. Winters said that he told E.C. that this would violate the contract. According to Winters, E.C. said that the Company had to do this. It could no longer afford to pay the premiums. Winters said that he said nothing more at the meeting.

With regard to Navin, Winters stated that on the day of this meeting he called him and informed him of what was going on—that the Company was going to make employees pay premiums—and that he needed to come to the plant. Later, Winters said he observed Navin speaking with E.C. in the hallway near the meeting area for about 30 seconds to 1 minute. According to Winters, the conversation ended but he recalled, as E.C. walked to the meeting area, Navin's telling E.C. "[Y]ou can't do this, you know, and you've got a contract." Winters said that E .C. did not respond and continued to the meeting. Winters said that Navin told him to call him when the meeting concluded.

Winters stated that after Natalia's presentation, it was understood by all of the employees that if they did not choose one of the plans, they would not be covered by any insurance. After the meeting, Winters said a lot of employees were angry over the sudden change when they (and he) believed the contract had been executed in April and was in force. Winters said he told the employees that he would call the Union and try to rectify the situation.

According to Winters, Navin and he discussed the need to have a meeting with management to put a halt to the change because the contract was in place (raises had been given) and nothing in the agreement permitted the health insurance change. However, Winters said all of their efforts were to no avail; and he signed up for the two parties' plans under the new insurance plan.[17]

Winters said that he filed a grievance on behalf of himself and the other unit members on August 11, 2011,[18] the day after the first of the premiums was deducted from his pay.

Winters said that he and Navin met with E.C. and Chuck after the filing and voiced their concerns. According to Winters, in Chuck's office, E.C. said at one of these meetings that employees needed to start paying the premiums. According to Winters, the matter remains unresolved, including the grievance.

Winters conceded that he could not recall either E.C. or Chuck's telling him (or Navin) at these meetings that the Company was going to pay 100 percent of the premiums. Winters said that he did not recall his asking about or E.C.'s speaking to a comparison of the Company's proposal with market prices.

VII. THE RESPONDENT'S WITNESSES

Edward Charles Muelhaupt III, who goes by E.C., testified[19] that he is and has been the vice president-elect of Des Moines Cold Storage for the past 2 years; he has worked for the Company since 2004. E.C. stated that his duties and responsibilities include general oversight of the business' development and operations.

E.C. stated that he was personally involved in the latest round of contract negotiations which began in late March 2010, and specifically the management negotiators were his father and himself; Navin and Winters comprised the union negotiating team.

E.C. testified that he disagreed with Navin's testimony regarding the events leading to the current litigation. E.C. said that his first point of disagreement lay in the number of negotiating sessions—there were three, not two as related by Navin. And second, that when the old agreement expired in March 2010, he believed that there was no contract in place until the new agreement was signed in late July 2010. E.C. went on to say that this was so because all of the terms of the new agreement were not resolved until the signing, specifically the health insurance issue.[20] E.C. stated that the reason this issue was unresolved was because the Company did not know what the rates would be at the time negotiations commenced and that the rates did not become available until late July from the insurance brokers handling the Company's account.[21]

---

[17] Winters volunteered that he had a sick wife and simply could not afford to be without insurance coverage. It was his understanding that if he did not sign up, he would have no coverage through the Company. Winters said that the choices offered by the Company were a single–person plan, a two-party plan; and a family plan.

[18] Winters identified GC Exh. 7 as a copy of the grievance he filed over this matter.

[19] E.C. Muelhaupt was also called as a witness by the General Counsel who was permitted by me to examine him under Rule 611(c) of the Federal Rules of Evidence.

[20] E.C. said that this was the sole unresolved and outstanding issue between the Company and the Union. (Tr. 126.) However, shown his affidavit, E.C. agreed that in it he averred that there were no negotiations on health insurance during the spring bargaining sessions.

[21] E.C. said that Natalia Boychenko of the Holmes Murphy Insurance Company handled the Company's insurance matters. Coventry was the plan's insurance carrier under the old contract as well as the new one executed by the parties in July 2010.

E.C. identified in GC Exh. 4 the Coventry insurance coverage plans that he offered the employees on July 20 and 23 and were implemented on August 1, 2010.

E.C. insisted that during the bargaining sessions that spring, neither he nor his father ever told Navin or Winters that the Company's past practice of paying full the insurance premiums would not change. According to E.C., the Respondent put the insurance out for competitive bids through its insurance agent in the timeframe leading up to July 2010, at which time the Company was able to get the best deal then available. It was at this time that he decided to hold the July 20 meeting with the employees to discuss the matter because the insurance options had to be acted on. E.C. stated that in fact the changes to the insurance were in the works some time prior to July 20—because he had received the rate increases from the brokers in late June or early July and, therefore, shortly before July 20 he had determined to begin charging the employees for a contribution to the premiums. (Tr. 143.)

E.C. said that he informed the Union "shortly before July 20" of the meeting and arranged to have Navin meet with him on July 20 at 4 p.m. E.C. conceded that he made no attempt to notify the Union or bargain with it about the insurance change other than the 4 p.m. meeting with Navin on July 20.

E.C. stated that he met with Navin at 4 p.m. on July 20; the meeting with employees took place at 4:30 p.m. at the East plant and was the first of two meetings with them. According to E.C., his meeting with Navin lasted about 10–20 minutes and it was cordial business-like; no one used heated words or raised voices.

E.C. said that Navin never told him he could not present the coverage proposals to the employees, and specifically never told him that he could not directly bargain with the employees.[22] E.C. also testified that Navin not only did not object to his presenting the proposals to the employees, he consented and gave him permission to do so for their feedback. E.C. conceded that it was unclear to him whether Navin gave his consent or permission to implement the proposals.[23]

E.C. stated that he recalled discussions with Winters about the insurance plans, but these occurred sometime after the July 20 meeting and not in the meeting itself. E.C. recalled that the meeting took place in his father's office and Winters asked how the Company's (insurance) price offerings compared to the market in general. According to E.C., he told Winters that the market price for the plans was twice as much as what the Company was offering in its proposals for a family in the State of Iowa. E.C. recalled that this conversation took place before he received any grievances over the matter from the Union.

E.C. could only say that he "thought" that he had discussions with Navin perhaps 2 weeks or less after the meeting with the employees. At this meeting, E.C. recalled that the meeting concerned health insurance and that only he and Navin were present. According to E.C., Navin asked about the plan and whether he had considered other plans and asked if the Union could be informed about the insurance plans prior to any decision to renew. E.C. said that the meeting was cordial and business-like.

E.C. insisted that the insurance plan he offered to the employees at the July meetings was merely a proposal and not an announcement of a change or a fait accompli; the employees were given the option to have the Union provide a counterproposal. E.C. conceded, however, that he indeed told them that under his proposal they would be expected to pay a portion of the insurance premiums going forward and that before the meeting the employees had never paid anything toward their insurance premiums; the Respondent paid the full premium amount. (Tr. 24–25.) E.C. testified that in his view what he proposed was not a new plan but new pricing for the same plan, and that if the employees agreed to the new pricing they would pay the amounts associated with the one-person, two-person, or family plans. E.C. denied ever telling the employees that they had to choose from these plans or forego coverage.

E. C. said that he told employees that had already spoken to Navin and that he had given him permission to speak with them, to present the proposal, to get their feedback; moreover, he (E.C.) was amenable to a counterproposal even as late as July 20. E.C. conceded, however, that August 1, 2010, was the "drop dead" date for the employees to make a decision, and that he gave them the week of July 26 to make their election because the insurance company needed time to process the employee election forms and also to give them time to consider their options.

According to E.C., even if the employees did not make an election, they probably would have stayed on the plan on which they were enrolled, unless they submitted an opt-out form. E.C. conceded, however, the employees who stayed on would have been subject to the new pricing arrangements.[24]

As to the July 23 meeting at the South plant, E.C. said that the insurance agent (Boychenko) gave the same presentation to the seven bargaining unit employees there. He recalled that his father (Chuck) and Plant Manager Dale Steele also attended. The South plant employees were also given the week of July 26 to make a decision.

E. C. admitted that the new insurance arrangement was implemented on August 1, with all but two employees signing up under the new plan; deductions from employee paychecks started on August 9 or 10 and employees since that time are paying 15–20 percent of the total premium costs.

Regarding the contract that his father signed on July 23 and 26, E.C. testified that, first, the language (in art. 14) dealing with health insurance was changed by Navin so that it could be interpreted to reflect the Respondent's obligation to pay 100 percent of the premium. Second, according to E.C., both he and his father signed the contract with the understanding that it included the health insurance proposals he had offered to the employees on July 20 and 23 and that the Union had agreed to

[22] E.C. identified R. Exh. 4, a copy of the coverage proposals he presented to the employees.

[23] E.C. stated on cross-examination that Navin entered the room where the employees met to receive the insurance proposals on July 20. Shown his affidavit, E.C. acknowledged that he averred that "Navin did not attend the employee meeting and did not ask to do so." E.C. insisted on the witness stand that Navin walked into the meeting room and, to his recollection, Navin left the room (before the presentation), that Navin had already heard the presentation from him (during the 4 p.m. meeting). (Tr. 140–141.)

[24] E.C. ultimately conceded that as a practical matter, he offered the employees three choices—Coventry Plans A and B, or no insurance through the Company. (Tr. 33.)

that understanding. E.C. stated that because of this understanding, the language of article 14 of the new contract was essentially the same as the previous contract[25] even though the employees were going to have to pay a portion of the premiums.

E.C. acknowledged that he had seen Navin's July 27, 2010 letter (GC Exh. 6) to his father protesting the Company's decision to implement changes to the employee health insurance benefits and requesting that the Company not do this. E.C. also acknowledged that the Respondent's management received Winter's grievance (GC Exh. 7) dated August 12, 2010, over the Company's implementation of the new insurance plan. According to E.C, the grievance was not timely according to the contract. E.C. admitted that the Company did not respond to the grievance.

E.C. stated that he was familiar with Navin's August 24, 2010 letter (GC Exh. 8) requesting certain information, but did not become aware of it until early in 2011. According to E.C. he did not assign anyone to respond to the request, and knew of no one else in the Company who might have responded to it.

Sandy Trimnell testified that she is employed by Des Moines Cold Storage and has been with the Company for about 26 years and currently serves as the controller; Trimnell said that her responsibilities and duties include doing the payroll, handling the various accounts, and preparing financial statements.

Trimnell stated that prior to August 1, 2010, the bargaining unit employees did not pay anything towards their health insurance coverage. However, after August 1, she was instructed to commence deducting from unit employees' pay a certain amount for health insurance premiums.

Trimnell recalled that while she had no role in the decision to institute the deductions, she did meet with E.C. and Chuck in August when the health insurance policy was renewed.

Trimnell also recalled a July meeting (she was not sure of the precise date) with the East plant employees, and that while she offices at the South plant, she attended this meeting. Trimnell stated that there were discussions about health insurance for all of the employees and that E.C. spoke to the issues. Trimnell testified that she saw Navin at this meeting, that he was seated perhaps between 8–12 feet from her. Trimnell noted that she could not recall Navin's saying anything at the meeting.[26]

Krista Larsen testified that she is employed by the Respondent at the East plant where she serves as the office manager. Larsen recalled attending a meeting of employees in July 2010 whereat E.C. discussed health insurance options. Larsen said that the meeting lasted about a half hour.

Larsen further testified that on the day of the meeting, she observed Navin and E.C. conversing in the hallway before the commencement of the meeting; she did not hear what they were talking about. According to Larsen, she was at the back of the break room and saw Navin standing just inside the doorway separating the hallway and the break room.

Larsen was shown a copy of the Company's proposals for employee health insurance (GC Exh. 4) and stated this was the proposal discussed at the meeting. Larsen testified that she observed E.C. discussing this proposal with Navin before the start of the meeting.

Larsen went on to say that she saw Navin[27] in attendance at the meeting at least for a portion of the meeting; Larsen stated that Winters also attended this meeting. Larsen said that she could not recall either man asking any questions of raising any objections at this meeting.

VIII. CONTENTIONS OF THE PARTIES

The General Counsel first asserts that health and medical benefits are mandatory subjects of bargaining and therefore cannot lawfully be changed without an employer's bargaining with the authorized representative of its employees in good faith. And, second, any employer that unilaterally changes and implements a mandatory subject not only without giving notice to the employees' collective-bargaining representative, but also without giving the representative an opportunity to bargain over the proposed changes, violates Section 8(5) and (1) of the Act.

The General Counsel contends that the credible evidence offered mainly through Navin but also Winters indisputably establishes that the Respondent violated Section 8(a)(5) by unilaterally implementing a new health insurance plan that resulted in a change of benefits, that is, requiring unit employees to pay a portion of their health insurance premiums, in contravention of the existing contract, and without giving the Union (sufficient) notice and opportunity to bargain. She notes that the Respondent significantly made the change to the health insurance in the absence of a lawful impasse in the negotiations.

The General Counsel submits that the contract covering the period April 1, 2010, to March 31, 2013, was in force and effect as of May 2010 when the parties completed their negotiations and each had ratified the deal. As proof, she notes that the unrebutted evidence showed that the renegotiated wages under this agreement were in place and being received by the unit employees as of the April 1, 2010 commencement date.

The General Counsel also contends that the Respondent did not establish economic necessity to justify its unilateral modification of the agreement on August 1 because the Company did not demonstrate that the health insurance costs presented an economic exigency that was unforeseeable . On this point, she notes that E.C. evidently knew that premium rates were going up, but he simply did not prepare for this contingency during the negotiations or before the new contract was agreed on and approved in May, and signed off on in July. Worse, E.C. did not bother to inform the Union at any time during the negotia-

[25] This latter response derived from my asking E.C. why his health insurance proposals given at the meetings on July 20 and 23 did not appear in the contract that Chuck and Navin signed on July 23 and 26. It is also noteworthy that E.C. testified that he was not aware that the new agreement signed on July 26, 2010, was retroactive to April 1, 2010.

[26] On cross-examination, Trimnell said that the meeting she attended was certainly in July and believed it was the second meeting about health insurance. She insisted that the meeting took place at the East plant, that she only attended one meeting. Trimnell also insisted that Navin was present during the meeting, and she stayed for the entire meeting. [Note: While Trimnell did not physically identify Navin on the record, I saw her look in his direction as she testified about his presence at the meeting.]

[27] Larsen identified Navin at the hearing.

tions that health insurance could be problematic. E.C. admitted that neither he (nor his father) raised the issue in the negotiations prior to July.

The General Counsel contends that the Respondent violated the Act also by attempting to bypass the Union and bargain directly with it by calling meetings with the unit employees without reasonably and timely consulting with and inviting the Union to attend and participate. At the meetings, she contends, E.C. handed out the new insurance plan options to the employees and instructed them to choose one for which they would, contrary to their agreement, now have to pay premiums. The General Counsel submits this unlawful act was essentially exacerbated by E.C.'s later telling the employees that they had to return the signed forms or lose their insurance.

The General Counsel asserts that on bottom, E.C. gathered the unit employees, engaged them directly in the proposal, and then implemented it—all without sufficient notification to the Union and inviting its participation at the meeting. The General Counsel contends this action constituted an impermissible bypassing of the Union and direct dealing with represented employees.

Turning to the alleged failure to provide information charges, the General Counsel argues that the law is crystal clear in that an employer has a duty to furnish relevant requested information to its employees' exclusive collective-bargaining representative so that the representative can adequately perform its duties to the employees.

Noting that where the sought information is related to the terms and conditions of the unit employees, here health insurance benefits, the Board considers such information presumptively relevant.

The General Counsel submits that Navin's written request of August 24, 2010, clearly sought information relevant and necessary for him to process Winter's grievance relative to the health insurance issue.

The General Counsel submits that E.C., who testified that he was responsible at the time for the operations of the Company, admitted to having seen the information request but took absolutely no action to provide the information or explain why he was not providing it. The General Counsel contends that this failure was violative of Section 8(a)(5) of the Act.

The Respondent asserts that the Union and, of course, the Company were fully aware that health insurance costs had become prohibitive and that at some point employees had to start paying a portion of the premium costs. Contrary to the General Counsel, the Respondent contends that Navin and E.C. did indeed bargain and in good faith prior to presenting the issue to the gathered unit employees in July. Moreover, and again contrary to the General Counsel, the Respondent asserts that Navin specifically approved E.C.'s proposal to have the employees pay a small portion of the premiums for their health coverage.

The Respondent contends that in point of fact, the collective-bargaining agreement was not signed until after both employee meetings—on July 26—and that the Union and the Company clearly had reached a meeting of the mind, an understanding, that the unit employees would be making a contribution toward the premium costs. The Respondent submits that if, as Navin seemed to be saying, the Union did not have this understanding, he should have written this into the contract.

Conceding that health insurance is a mandatory subject of collective bargaining, the Respondent, nonetheless, submits that the Union gave no clear indication to E.C. that it believed the Company was failing or refusing to bargain over the issue. The Respondent contends that E.C. believed that if there were an issue, the Union could or should have made a counterproposal; but the Union did not. Accordingly, the Respondent contends that E.C. rightly believed that his discussions with Navin prior to the meeting constituted sufficient and legitimate—good faith—bargaining with adequate notice to the Union prior to the employee meetings.

In essence, the Respondent contends that the Company did not breach the contract because the Union did not establish that the Company actually agreed to pay 100 percent of the health insurance premiums effective August 1, 2010. The Respondent submits that Navin's claim that Chuck Muelhaupt repeatedly gave him assurances that the Company would continue to pay the entirety of the health premiums should be discredited, especially since E.C. denied any such agreement.

The Respondent concludes that there was no unilateral action on its part regarding the health insurance issue, that in point of fact there was an understanding and agreement by the parties on the subject, arrived at mutually with notice and after bargaining, that the employees would contribute a part of the premiums. The Respondent contends that it did not violate the Act in any respect regarding the health insurance issue.

Turning to the remaining complaint allegation dealing with (presumably) the failure to provide information, the Respondent states that the "ensuing attempted grievance" merely reflected the Union's dissatisfaction with the deal it had made.[28]

Applicable Legal Principles

Section 8(a)(5) of the Act states that an employer must bargain collectively with the representatives of its employees and "confer in good faith with respect to wages, hours, and other terms and conditions of employment." Health insurance and medical benefits constitute mandatory subjects of bargaining, and it is therefore unlawful for an employer to change health care benefits without the bargaining union's consent. See *E. I. DuPont De Nemours, Louisville Workers*, 355 NLRB 1084, 1094 (2010), citing *Mid-Continent Concrete*, 336 NLRB 258 (2001), enfd. 308 F.3d 859 (8th Cir. 2002). Furthermore, an employer's attempt to bypass the union and bargain directly with employees constitutes a violation of Section 8(a)(5) and (1) of the Act. *United Cerebral Palsy of New York City*, 347 NLRB 603, 608 (2006).

The Respondent must hold to a clear and unmistakable duty under the Act to bargain in good faith. The Board has found that dilatory and evasive negotiation tactics, such as the failure

[28] This is, in main, the Respondent's entire argument on the information request allegations. At the risk of some speculation on my part, it seems that the Respondent contends that since the grievance was illegitimate or based on a kind of buyer's remorse, any information requested based on it was improper and the Respondent was not bound to honor the information request. The Respondent cited no legal authority on this point if indeed this was its argument.

to express a willingness to bargain or meet at reasonable times, are evidence of subjective bad faith. See *J & C Towing Co.*[29]

Notably, consistent with Section 8(a)(5), Section 8(d) of the Act "imposes an obligation on each party to a contract to refrain from modifying the contract without complying with the notice and waiting periods therein set forth." *Oak Cliff-Golman Baking Co.*, 202 NLRB 614, 616 (1973). Section 8(a)(5) and 8(d) combine to establish an employer's obligation to bargain in good faith with respect to "wages, hours, and other terms and conditions of employment . . ." before reaching a good-faith impasse in bargaining. *Milwaukee Spring II*, 268 NLRB 601, 602 (1984). Section 8(d) imposes an additional requirement when a collective-bargaining agreement is in effect and an employer seeks to "modif[y] . . . the terms and conditions contained in the contract; [In such a case] the employer must obtain the union's consent before implementing the change." Id.

Unless a legitimate (good-faith) impasse is reached, employers may not make unilateral changes to the collective-bargaining agreement. The Supreme Court has held that an employer's unilateral change to conditions of employment may pose a violation of Section 8(a)(5). Unilateral change is defined as a "circumvention of the duty to negotiate which frustrates the objectives of 8(a)(5) much as does a flat refusal." *NLRB v. Katz*, 369 U.S. 736, 743 (1962). An employer may not make a unilateral change to a term or condition of employment before reaching a good-faith impasse in bargaining, and "an employer commits an unfair labor practice, if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment." *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991). An impasse occurs at "that point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile . . . . Both parties must believe that they are at the end of their rope." *PRC Recording Co.*, 280 NLRB 615, 635 (1986); *Truserv Corp. v. NLRB*, 254 F.3d 1105, 1114 (2001).

An employer's unilateral change to a matter that is a subject of mandatory bargaining under Section 8(d) of the Act is a violation of the duty to bargain collectively, as required by Section 8(a)(5) of the Act. *NLRB v. Katz*, 369 U.S. 736 (1962). Insurance benefits for employees are considered among those matters that are subjects of mandatory bargaining, and an employer's unilateral modification of such benefits may constitute an unfair labor practice. *Allied Chemical & Alkali Workers of America Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971).[30] Any material, substantial, or significant changes made by an employer to an employee's health insurance benefits has been determined to be violative of Section 8(a)(5) and (1) if that employer has not first provided the employees' bargaining representative notice and an opportunity to bargain. *Pioneer Press*, 297 NLRB 972, 976 (1990).

In *Disneyland Park*,[31] the Board set out long-established principles applicable to information request cases brought under Section 8(a)(5) and (1) of the Act.

An employer has the statutory obligation to provide, on request, relevant information that the union needs for the proper performance of its duties as collective-bargaining representative. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967). *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). This includes the decision to file or process grievances. *Beth Abraham Health Services*, 332 NLRB 1234 (2000).

Where the union's request is for information pertaining to employees in the bargaining unit, that information is presumptively relevant and the Respondent must provide the information. However, where the information requested by the union is not presumptively relevant to the union's performance as bargaining representative, the burden is on the union to demonstrate relevance. *Sunrise Health & Rehabilitation Center*, 332 NLRB 1304 (2000). *Associated Ready Mixed Concrete*, 318 NLRB 318 (1995), enfd. 108 F.3d 1182 (9th Cir. 1977); *Pfizer, Inc.*, 268 NLRB 916 (1984), enfd. 736 F.2d 887 (7th Cir. 1985). A union has satisfied its burden when it demonstrates a reasonable belief, supported by objective evidence, that the requested information is relevant. *Knappton Maritime Corp.*, 292 NLRB 236, 238–239 (1988).

Furthermore, the Board instructs that the requesting union's explanation of relevance must be made with some precision; and a generalized conclusionary explanation is insufficient to trigger an obligation to supply information.[32]

The Board has held that information concerning bargaining unit employees is presumptively relevant and is required to be produced. *Contract Flooring System*, 344 NLRB 925, 938 (2005).

Where the information sought concerns the filing or processing of grievances, the requesting union is entitled to the information in order to determine whether it should exercise its representative function in the pending grievances, or whether the information will warrant further processing of the grievance or bargaining about the matters involved with the grievance. *Ohio Power Co.*, 216 NLRB 987 (1975), enfd. 531 F.2d 138 (6th Cir. 1976).

Accordingly, a union is entitled to relevant information during the term of a collective-bargaining agreement to evaluate or process grievances and to take whatever other bona fide actions are necessary to administer the collective-bargaining agreement. *Reno Sparks Citilift*, 326 NLRB 432 (1998).

[29] 307 NLRB 198 (1992). In *J & C Towing Co.*, the Board found that the employer engaged in bad-faith bargaining, describing the employer's single-bargaining session a "sham" when it stalled on agreeing to the meeting and then dragging its feet in addressing specific topics during the negotiations.

[30] If it is argued that the Union has waived its right to bargain over such mandatory subjects, the waiver must be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

[31] 350 NLRB 1257 (2007).

[32] *Island Creek Coal*, 293 NLRB 480, 490 fn. 19 (1989). See *Schrock Cabinet Co.*, 339 NLRB 182, 182 fn. 6 (2000). It should be noted that the obverse side of this legal coin requires the employer from whom information is sought to substantiate the claimed basis for nonproduction, seek a narrowing or clarification of the union's request if it is overly broad, burdensome, or presents undue financial burden; and seek protection if the production involves confidential (proprietary) information. See *Island Creek Coal Co.*, supra. *Pulaski Construction Co.*, 345 NLRB 931 (2005), *Watkins Contracting Inc.*, 335 NLRB 22 (2001), *Earthgrains Baking Co.*, 327 NLRB 222 (2001), 327 NLRB 605 (1999).

The Board uses a broad, discovery-type standard in determining the relevance of requested information. Potential or probable relevance is sufficient to give rise to an employer's obligation to provide information. Id. To demonstrate relevance, the General Counsel must present evidence either (1) that the union demonstrated relevance of the nonunit information,[33] or (2) that the relevance of the information should have been apparent to the Respondent under the circumstances. See *Allison Co.*, 330 NLRB 1363, 1367 fn. 23 (2000); *Brazos Electric Power Cooperative, Inc.*, 241 NLRB 1016–1019 (1979), enfd. in relevant part 615 F.2d 1100 (5th Cir. 1980). Absent such a showing, the employer is not obligated to provide the requested information.

When the union's request for information involves matters outside the bargaining unit, thereby making the burden or requirement that it demonstrate relevance of the information sought, the union's burden is not an exceptionally heavy one, essentially only requiring a showing of probability that the desired information is relevant and that it would be of use to the union in carrying out its statutory duties and responsibilities. *NLRB v. Acme Industrial Co.*, supra at 437.[34]

Discussion and Conclusions

The gist of the Respondent's defense is that the parties' contract as of July 20 and 23, 2010, was not finalized because one item—the health insurance—was not resolved. Because the contract was not formerly in place, the Respondent contends that it was free to propose and make adjustments governing the employees' contribution to the insurance premiums. The Respondent believes that it gave sufficient notice to the Union on July 20 prior to the first employee meeting, discussed the matter prior to the meeting with the Union, and obtained the Union's permission to present the premium contribution plan to the assembled unit members. Having taken all of the reasonable steps one could associate with the duty to bargain in good faith, that is, giving prior notice, actually bargaining over the matter, and then seeking and obtaining permission from the Union to speak to the employees directly about the Company's proposal, the Respondent asserts it did not violate the Act.

As to the Company's failure to provide the information requested by the Union, the Respondent, at least according to E.C., contends the grievance was filed untimely under the parties' agreement, and a fortiori the Company was under no duty to provide the requested information based on the noncompliance with the agreement.[35]

I have considered this defense which, in large measure would require me to discredit the testimony of the union representatives, Navin and Winters, something I decline to do. First I found that Navin and Winters, but primarily Navin, were both exceptionally credible witnesses and, moreover, the records essentially corroborated the Union's position.

In rejecting the Respondent's defense, I have given great weight to the parties' historical relationship which by all accounts was a very good one, amicable and longstanding. It seems that over the decades the parties had so little in the way of contract-related disputes that Navin, a relative newcomer to the negotiations, viewed the shop as low pressure. Winters, a 15-year employee confirmed the parties' good and stable management-labor relationship. In point of fact, at least as to the health insurance matter according to Winters, the Company had always paid 100 percent of the insurance premiums during the 15 years he has worked for the Company.

Given this good and stable relationship, it seems unlikely to me that the parties had not come to an enforceable agreement by July 20, 2010. I note that at the time of the proposed changes by E.C., the parties were not in ongoing negotiations which, as Navin said, had concluded in May. Even E.C. admitted that during the negotiations, the parties did not really discuss health insurance provisions. This lends further credence to Navin's testimony that aside from his suggestion about the Central States plan, the Respondent (Chuck and E.C.) did not propose any changes either to the employee's health insurance benefits or the method by which health insurance premiums would be paid.

I also credit Navin who stated that the contract for 2010–2013 was ratified and in full force and effect as of May 2010. Notably, on this point, he stated without contradiction that the negotiated wage increases under the new contract had been received by unit members; Winters, an employee who would know also, testified again without contradiction that he had received the new wage rates.

I note also that E.C. did not contend that the parties had reached an impasse on the health insurance matter, and clearly on this record none was reached, at least not in any formal way that would alert the Union that the insurance premiums were an issue for the Company.

On bottom, it seems abundantly clear to me that the parties' 2010–2013 contract was already in place prior to July 23 or 26, 2010, the days on which the parties formally signed the document. I note on this score that article 14 of the new contract was essentially identical to that of the previous (2007–2010) contract with exception of the omission of some language whose absence Navin credibly explained.

E.C. testified that the essentially unchanged language reflected, nonetheless, the parties' "understanding" that the unit members would now have to pay something toward the premiums. The weakness of this position is exposed in that if there were such an "understanding," the amount or percentage the employees were to pay is not clearly stated. It defies common sense to think that the parties with a long term relationship would leave such an important matter to a vague notion as to what the employees would be required to contribute.

This is not set out in the agreement because, as I view the matter, the new contract as agreed upon did not require any contributions from the unit members just as it had not in the

[33] The Board noted further in *Disneyland Park* that it will apply a uniform standard for evaluating the relevance of information requests involving matters outside the bargaining unit.

[34] See also *St. George Warehouse, Inc.*, 341 NLRB 904, 925 (2005), citing *Hertz Corp.*, 319 NLRB 597, 599 (1995), wherein the union's showing of relevance was deemed not exceptionally heavy and would be satisfied by some initial but not overwhelming demonstration by the union.

[35] The Respondent, I should note, did not articulate its defense precisely as I have set out. This is my interpretation of the position taken by the Company.

past. In my view, the Respondent unilaterally changed the parties' agreement concerning a mandatory subject of bargaining—the employees' health insurance coverage and premiums—effective about August 1, 2010. In so doing, the Respondent violated Section 8(a)(5) of the Act.

As to the Respondent's claim that in speaking to Navin about a half-hour prior to the July 20 employee meeting, it satisfied its duty to provide notice to the Union of the proposed changes and at the same time give the Union an opportunity to bargain over the matter, I would find and conclude that the Respondent did not meet its good-faith bargaining obligations.

First, the Respondent did not on its own volition notify Navin. I believe Navin only found out about the first meeting because Winters alerted him. Navin, out of duty, went to the plant and discussed the matter with E.C. However, I believe any "discussion" between E.C. and Navin redounded merely to Navin's vocal opposition to E.C.'s plan and E.C.'s insistence and persistence in going forward with his plan. Under these circumstances, to include a half hour's notice which in my view provided no real opportunity to bargain over the proposal, coupled with the Respondent's already made decision to proceed with the meeting and broach the proposed changes, I would find and conclude that the Respondent did not bargain in good faith and violated the Act.

I also would credit Navin's denial that he gave E.C. permission to deal directly with the unit members of the issue. Contrary to the Respondent's witnesses, I would credit his denial of attending the July 20 meeting for the reasons he stated. As to the testimony of witnesses Larsen and Trimnell, both of whom claimed that Navin attended one of the two employee meetings, I believe they were simply mistaken.

Clearly Navin was onsite on July 20, speaking with E.C. in the hallway outside of the break room where the meeting was shortly to take place. Larsen and Trimnell probably observed him at the time and wrongfully concluded that he attended the meeting.

Notably, Trimnell believed she observed Navin at the second meeting on July 23 when the record clearly established that Navin came to the East plant on July 20. On the other hand, aside from Navin's denial of attending, Winters testified credibly Navin left the plant but instructed him to report on the meeting. All in all, Navin in my mind did not grant E.C. permission to broach the proposal to the unit members and in that respect, E.C. improperly directly dealt with the unit members in violation of the Act.

This brings me to failure to provide information allegations. Notably, it is undisputed that the Union filed a grievance over the Respondent's actions on or about August 9 or 10. Again in service to my earlier findings, this grievance is inconsistent with any contention that the Union gave permission to the Respondent to broach health insurance proposals to the unit or that there was an "understanding" that the Union and the Company agreed to the health insurance premium contribution. Both Navin and Winters testified credibly regarding the Union's decision to pursue the grievance. Furthermore, Winters credibly explained his decision to wait until the Company made initial deductions for the health insurance premiums.

I note that the new contract (2010–2013) requires in article 9 that all grievances must be put in writing within 7 working days from the day the cause for the grievance occurred and signed by the aggrieved employee. This change to the employee contributions for health insurance were to become effective August 1, 2010, a Sunday. Winters filed his grievance on August 11, the day after the first deductions were made from his paycheck. The seventh working day for purposes of filing grievances was arguably August 10. In this regard, Respondent could have determined that the grievance was indeed untimely. However, in my view, that is a moot point because the Respondent made absolutely no reply or response either to the grievance or the information request based thereon on August 24, 2010. Any defense to the information request should have been made at that time. The Respondent, however, chose not to respond to the grievance as well as information request based thereon.

As to the information request, I would find and conclude that the information sought was clearly relevant to the Union's duties to the bargaining unit as its exclusive representative. Accordingly, I would find and conclude that the Respondent violated Section 8(a)(5) and (1) of the Act by not providing the information requested by the Union on August 24, 2010.

CONCLUSIONS OF LAW

1. The Respondent, Des Moines Cold Storage, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The bargaining unit as described in the collective-bargaining agreement between the Respondent and the unit effective April 1, 2010, through March 31, 2013, is an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act.

3. The Union, General Team and Truck Drivers, Helpers and Warehousemen, Local 90, is a labor organization within the meaning of Section 2(5) of the Act and has been recognized in the parties' agreement as the designated exclusive collective-bargaining representative of the unit as stated above.

4. The Respondent violated Section 8(a)(5) and (1) of the Act by:

(a) Bypassing the Union and directly dealing with unit employees concerning their health insurance benefits and unilaterally offering unit employees new health insurance options.

(b) Unilaterally modifying the terms of the parties' collective-bargaining agreement without the Union's consent, notice, or opportunity to bargain over the modification.

(c) Unilaterally making changes in the unit employees' health insurance benefits without first notifying the Union, giving it an opportunity to bargain, and bargaining in good faith to impasse.

(d) Failing and refusing to timely provide the Union with the information requested by it in a letter dated August 24, 2010, sent to and received by the Respondent on about August 26, 2010.

The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent engaged in unfair labor practices, I recommend that the Respondent cease and desist therefrom and take additional affirmative action necessary to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally modifying the terms of the parties' collective-bargaining agreement regarding the unit members' health insurance benefits, the Order will require the Respondent to restore to bargaining unit employees, at the Union's request, the health insurance coverage they enjoyed before the Respondent unlawfully changed such coverage in August 2010; to make all bargaining unit employees whole for all losses they may have suffered as a result of the Respondent's unlawful unilateral change plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010); and to furnish at the Union's request the relevant information called for in its August 24, 2010 letter.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[36]

ORDER

The Respondent, Des Moines Cold Storage, Inc., of Des Moines, Iowa, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Bypassing the Union and directly dealing with unit employees concerning their health insurance benefits and unilaterally offering unit employees new health insurance options.

(b) Unilaterally modifying the terms of the parties' collective-bargaining agreement without the Union's consent, notice, or opportunity to bargain over the modification.

(c) Unilaterally making changes in the unit employees' health insurance benefits without first notifying the Union, giving it an opportunity to bargain, and bargaining in good faith to impasse.

(d) Failing and refusing to timely provide the Union with the information requested by it in a letter dated August 24, 2010, sent to and received by the Respondent on about August 26, 2010.

(e) Refusing to bargain collectively and in good faith with General Team and Truck drivers, Helpers and Warehousemen, Local 90.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On written request of the Union, restore to bargaining unit employees the health insurance benefits and coverage they enjoyed before the Respondent unlawfully changed the benefits and coverage in August 2010; make all bargaining unit employees whole for all losses they may have suffered as a result of the Respondent's unlawful unilateral changes, plus daily compound interest as proscribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

(b) On written request of the Union furnish to it within a reasonable time (not to exceed 30 days from the date of the request) the information requested by the Union in its letter dated August 24, 2010, to the Respondent.

(c) Within 14 days after service by the Region, post at its facilities in Des Moines, Iowa, copies of the attached notice marked "Appendix."[37] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facilities involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since August 1, 2010.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. August 17, 2011

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT bypass the Union as our employees' exclusive collective-bargaining representative by directly dealing with unit employees concerning their health insurance benefits or

[36] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec, 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[37] If this Order is enforced by a judgment of a United States court of appeals, the words on the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

any other matter regarding their wages, hours, and other terms and conditions of employment.

WE WILL NOT unilaterally modify the terms of our collective-bargaining agreement with the Union without the Union's consent.

WE WILL NOT make unilateral changes in our bargaining unit employees' health insurance benefits or any other terms and conditions of employment without first notifying the Union, giving the Union an opportunity to bargain, and bargaining in good faith to impasse.

WE WILL NOT refuse to provide to the Union the requested information which is necessary and relevant to the Union's performance of its functions as our bargaining unit employees' exclusive collective-bargaining representative.

WE WILL NOT otherwise fail and refuse to bargain in good faith with the Union as the exclusive collective-bargaining representative of our employees.

WE WILL, at the Union's request, reinstate the same health insurance plan and benefits in effect for our bargaining unit employees before we implemented unilateral changes in those benefits in about August 2010.

WE WILL make all bargaining unit employees whole for any and all losses—including premium payments and out-of-pocket medical expenses—incurred as a result of the unilateral changes in health insurance benefits were implemented in about August 2010.

WE WILL, at the request of the Union, provide to the Union requested information that is necessary and relevant to its performance of its collective-bargaining functions, as listed in its written information request letter dated August 24, 2010.

WE WILL bargain in good faith with the Union as the exclusive collective-bargaining representative of our employees.

DES MOINES COLD STORAGE, INC.